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No. 73-830

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COMEN,
Deputy Associate General Counsel,
ABIGAIL COOLEY,
Assistant General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 1–53) [1] is not yet reported. The decision and order of the Board are reported at 192 NLRB 173 (Pet. App., pp. 54–77, 78–106).

[1] Since the opinions below are lengthy and have already been reproduced as an appendix to the petition of *The Emporium Capwell Co.*, in No. 73-696, O.T. 1973, seeking review of the same judgment, "Pet. App." references are to the appendix to that petition.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 23) was entered on June 29, 1973. On September 19, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to discharge employees who, during good faith efforts by the union that is the exclusive bargaining representative of the employees to eliminate alleged racially discriminatory employment practices under the grievance and arbitration procedures of the collective bargaining contract, insisted that the company bargain directly with them to eliminate those practices and, upon the company's refusal to do so, picketed the company and urged customers to boycott it.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Pet. App., 108–110.

STATEMENT

A. The Board's Findings of Fact

The Company operates a retail department store in San Francisco, California (A. 232–233).[2] Through its membership in a multi-employer group, the Retailer's Council, the Company was signatory to a collective

[2] "A." refers to the appendix to the briefs in the court below. A copy has been filed with the clerk.

bargaining agreement with the Department Store Employes Union (the "Union"), which was the exclusive bargaining representative of the employees in the stock and marking areas of its store (A. 233). The applicable bargaining agreement provided:

> Section 21(E), No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex.
>
> * * * * *
>
> Section 5(B), Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement * * * may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and permissive within this agreement. [A. 233; 131–132, 205, 201.][3]

The agreement also provided that, if after considering a submitted issue for one week the Adjustment Board were unable to reach a settlement, either party could insist upon binding arbitration (A. 233; 208). Finally, the agreement contained a clause providing that there "shall be no strike or lockout during the life of this agreement" (Section 36(A), A. 233; 208).

In a series of meetings in early April 1968,[4] a group of Company employees, including Tom Hawkins and James Joseph Hollins, submitted to union representatives a list of grievances alleging that the Company

[3] The Adjustment Board consisted of six members, three from the Company and three from the Union (Section 36(B), A. 208).

[4] All dates are in 1968 unless otherwise indicated.

was discriminating against racial minorities (A. 233; 133–134), including the charge that employee Russell Young had been denied advancement solely because he is black (A. 234; 134–135). Following these meetings, Union Secretary-Treasurer Walter Johnson designated a union committee to investigate the allegations, and later prepared a detailed report outlining the employees' contentions, which stated:

> Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination does exist and that this discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age. [A. 234; 116, 134–135, 193.] [3]

Shortly thereafter, Johnson presented his report to the Retailer's Council, which concluded that the grievances should be taken directly to the Company (A. 34–35). Accordingly, in mid-April, Johnson met with Company labor relations manager Paul Ehrenfried and it was agreed that the Company "would look into" the situation and "see what could be done" (A. 234; 135).

In May, a group of ten employees, including Hawkins and Hollins, again met with Union representative Johnson. They discussed the problem of racial discrimination in general and the Russell

[3] Copies of the report were distributed to several union members, and Hawkins and Hollins (who were not members of the Union) saw it prior to engaging in their concerted protest (A. 41–42, 117, 138).

Young case in particular (A. 234; 134–136); however, since Young was about to begin his summer vacation, it was agreed that further investigation of the matter should await his return (*id.* at 134–135).

On about September 3, Johnson again met with the employees, including Hawkins and Hollins, and with representatives of the State Fair Employment Practices Committee ("FEPC") and the local Economic Opportunity Council ("EOC") (A. 234; 112, 136). At that meeting Johnson stated that the Union had considered the problem and had concluded that the Company had been acting discriminatorily. He added that in accordance with its contract the Union would demand an Adjustment Board proceeding and would insist upon arbitration if necessary. While acknowledging that arbitration was a time-consuming procedure (A. 234; 146), Johnson pointed out that an arbitration award, once achieved, would produce a "long lasting effect" which would benefit not only the employees having an immediate interest in the problem, but "other people involved in it" as well (A. 234; 136–137, 146).

Some of the employees present expressed "frustration" with Johnson's proposal, and suggested that the Union picket the Company's store (A. 145–146). Johnson rejected the idea, and, in an exchange with Hollins, explained that the Union was obligated to seek satisfaction of grievances according to the terms of its contract and thus could not engage in "dramatic" protests such as boycotts (A. 244–245; 145–147). Johnson further stated that, while individual employees "could take whatever action they wanted so long as it was

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legal," it was the Union's advice that they follow an "orderly legal procedure" (A. 145–146). The EOC and FEPC representatives supported Johnson's position (A. 234; 137, 146, 148–149, 153–155).

The next day, Johnson wrote Vincent Brown, general manager of the Retailer's Council, requesting a meeting of the Adjustment Board to resolve the grievances discussed at the previous day's meeting. The letter stated (A. 235; 144, 166):

> We specifically charge the Emporium with violations of Sections 5(B) and 21(E), of the Agreement between the San Francisco Retailers Council and [the Union]. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position.
>
> We are ready to proceed to immediate arbitration if The Emporium is ready.

In response to this letter, a meeting of the Adjustment Board was convened on October 16. At the outset, Union agent Williams attempted to present evidence of the Company's practices by questioning employees regarding their individual grievances. He was interrupted by Hollins, who—acting as spokesman for himself and employees Hawkins, Epps, and Washington—read a prepared statement objecting to the prosecution of grievances on an individual rather than a group basis and stating that the four employees would not "speak as individuals," but would act only "as a group" (A. 235; 43–44, 49, 115, 113). Hollins added that the group "wanted to talk to the President of The Emporium and wouldn't talk to anybody else" (A. 235; 62, 60), that their "main purpose was to talk to the President to try to reach an agreement with

him to straighten out the problems and conditions of The Emporium" (A. 235; 60). Then, after refusing to give any testimony regarding the individual employee complaints, Hollins, Hawkins, Epps, and Washington walked out of the meeting (A. 235; 43–44, 114).

The Adjustment Board met again on October 18, but none of the four attended. The record is unclear as to what transpired at the meeting, but thereafter, through the Union's intervention, Russell Young was promoted to the position of First Assistant Manager, and Fata, another minority employee, was also promoted to a supervisory position (A. 236; 55–56).[*]

After the October 18 meeting, Hollins went to Company President Batchelder and insisted that they "talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store". Batchelder would not speak with Hollins, but suggested that Hollins discuss the situation with Henderson, the Company's personnel director (A. 236; 120–121). Hollins refused (A. 236; 122).

On October 22, Hawkins and Hollins, together with several other employees, called a press conference at the Sun-Reporter Building in San Francisco, which was attended by representatives of the press, radio, and television. The employees stated that the Emporium was engaging in racist conduct by discriminating against racial minorities and that the employees were

[*] Notwithstanding the results achieved for Young and Fata, the Union's attorney advised the Union that further success with arbitration was unlikely without the testimony of Hawkins, Hollins, and the other employees (A. 138).

Appendix

DECISION OF CIRCUIT COURT OF APPEALS FOR DISTRICT OF COLUMBIA IN WESTERN ADDITION COMMUNITY ORGANIZATION NLRB

(OFFICIAL TEXT)

United States Court Of Appeals
for the District of Columbia Circuit

No. 71-1656

Western Addition Community Organization

vs.

National Labor Relations Board, Respondent
The Emporium Capwell Company, Intervenor
for the District of Columbia Circuit.

Decided June 29, 1973

Kenneth Hecht of the bar of the Supreme Court of California, *pro hac vice,* by special leave of Court, with whom *Edward Steinman* and *Lee M. Modjeska* were on the brief, for petitioner.

Stephen C. Yohay, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court with whom *Marcel Mallet-Prevost,* Assistant General Counsel, and *Abigail Cooley Baskir,* Attorney, National Labor Relations Board, were on the brief, for respondent.

George O. Bahrs was on the brief for intervenor.

Martin I. Slate, Attorney, Equal Employment Opportunity Commission, of the bar of the United States District Court for the District of Columbia *pro hac vice,* by special leave of Court with whom *Julia P. Cooper,* Chief, Appellate Section, Equal Employment Opportunity Commission, was on the brief for Equal Employment Opportunity Commission as amicus curiae urging reversal.

Before ROBINSON and MACKINNON, *Circuit Judges,* and CHARLES WYZANSKI* *Senior U.S. District Judge* for the District of Massachusetts.

Opinion for the court filed by *Circuit Judge* MACKINNON.

Dissenting opinion filed by *Senior District Judge* WYZANSKI.

Western Addition Community Organization v. N.L.R.B. No. 71-1656

MACKINNON, *Circuit Judge:* This case is before us on the petition of the Western Addition Community Organization to review an order[1] of the National Labor Relations Board which dismissed a complaint issued against the Emporium (hereinafter referred to as the Company) for alleged violations of section 8(a) (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. (hereinafter referred

*Sitting by designation pursuant to Title 28 U.S.C. Section 294(d) (1970).

[1]The Board's decision is reported at 192 NLRB No. 19, 77 LRRM 1669 (1971).

to as the Act).[2] The Company is engaged in the operation of a retail department store in San Francisco, and was a member of a multi-employer group, the Retailer's Council, which served as its bargaining agent. The Retailer's Council, was a signatory to a collective bargaining agreement with the Department Store Employees Union (hereinafter the Union) which was the exclusive representative of the Company's employees employed in the stock and marking areas at the store. The applicable collective bargaining agreement contained an anti-discrimination clause[3] and provided that grievances arising out of the agreement "may be referred to the Adjustment Board,"[4] and possibly submitted to arbitration.[5] The agreement also contained no-strike and no-lockout clauses.

In a series of meetings in early April 1968, a group of Company employees including Tom Hawkins and James Joseph Hollins submitted to the Union representatives a list of grievances in which the employees

[2]Section 8(a)(1), 29 U.S.C. § 158(a)(1) provides:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

[3]The clause provided:

Section 21(E), "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex."

[4]Section 5(B) of the agreement provided:

Section 5 (B), "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and permissive within this agreement."

[5]The agreement provided that if after considering a submitted issue for one week the Adjustment Board was unable to reach a settlement, either party could *insist upon binding arbitration.*

contended that the Company was discriminating against racial minorities. Claiming that racial bias had caused minority employees to be denied promotions, the employees at the outset centered their complaint and specifically charged that employee Russel Young had been denied advancement solely because he was Black. Following these meetings, Union Secretary-Treasurer Walter Johnson designated a Union committee to investigate the allegations, and later that month prepared a detailed report outlining the employees' contentions which "raised . . . the possibility [not solely of Young's complaint but] of *racial discrimination.*"[6] (Emphasis added.) Shortly thereafter, Johnson presented his report to the Retailer's Council, where it was agreed that the grievances should be taken directly to the Company. Accordingly, in mid-April Johnson met with the Company labor relations manager and it was agreed that the Company "would look into" the situation and "see what they could do."[7]

In May, a group of ten employees requested an additional meeting with Johnson. The problem of racial discrimination in general and the Russel Young case in particular were again discussed, however,

[6]This report stated:

> Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

[7]Trial Examiner's Decision, appended to the Board's decision 192 NLRB No. 19, (hereinafter cited as TXD) at 3.

since Young was about to begin his summer vacation, it was agreed that further investigation of the matter should await his return.

On about September 3, Johnson again met with the employees including Hawkins and Hollins, and with representatives of the Fair Employment Practices Committee (FEPC) and the Economic Opportunity Council (EOC), and announced that the Union had considered the problem and had concluded that the Company had been acting discriminatorily. Further, the Union stated that it would demand an Adjustment Board proceeding and would insist upon arbitration if necessary. While acknowledging that arbitration was a time-consuming procedure, Johnson pointed out that the arbitration award, once achieved, would produce a "long lasting effect" which would benefit not only the employees having immediate interest in the problem, but "other people involved in it" as well.[8]

[8]Johnson further testified at the hearing before the Trial Examiner:

> [W]e wanted to process *these grievances* and *we felt that there were problems of discrimination* and it was my own personal feeling that *all the discriminatory acts should be processed and that we ought to follow through and take care of it* (A. 136).
>
> • • •
>
> [I]t was my feeling certain acts had to take place in order that *everybody* at the Emporium would have an opportunity not only to have a job, but to advance into positions (A. 137).
>
> • • •
>
> I specifically requested and pointed out that it is going to take a long time in some of these cases, but that they would not only be helping themselves, but other people involved in it, because we had very strong feelings on the question (A. 136-137). (Emphasis added.)

References are to the appendix in this case.

However, the program outlined by Johnson did not satisfy all of the employees. Some of those present expressed "frustration" with the situation and requested that the Union picket the Company's store. Johnson rejected the idea and explained that the Union was bound to seek satisfaction of grievances according to the terms of the collective bargaining agreement. He also stated that though he told the minority employees, including Hawkins and Hollins, that it was his advice that they follow the Adjustment Board and arbitration procedures, he stated that "if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals."[9] The EOC and FEPC representatives also recommended that the contract procedures be followed.

The next day Johnson wrote the general manager of the Retailer's Council requesting a meeting of the Adjustment Board to resolve the grievances discussed at the previous day's meeting. Johnson told the Council

> We specifically charge the Emporium with violations of [the anti-discrimination clause] of the Agreement between the San Francisco Retailers Council and [the Union]. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position. We are ready to proceed to immediate arbitration if the Emporium is agreeable.[10]

In response to this letter, on October 16 a meeting was convened of the Adjustment Board.

[9]Append. at 149.

[10]TXD at 4.

As the meeting began, Union Agent Williams attempted to present evidence of the Company's practices by questioning employees regarding their individual grievances. However, he was interrupted by Hollins who, speaking for himself and three other employees[11], read a prepared statement objecting to the prosecution of grievances on an individual basis. Those employees did not want to "speak as individuals," but would act only "as a group."[12] Further, Hollins stated that the group "wanted to talk to the President of the Emporium and wouldn't talk to anybody else, since their "main purpose was to talk to the President to try to reach an agreement with him to straighten out the problems and conditions of the Emporium."[13] Then, after refusing to give any testi-

[11]The other employees were identified at Hawkins, Epps and Washington.

[12]Hawkins testified:

> The sense was that they [i.e., the Union] wanted to do something, but they wanted to go through the procedure of this retailers counciling [*sic*] and it was going to be individually when it came about when we were still talking group matters.
>
> [I]t was individual persons that would say something and on their behalf they would take it into consideration instead of a group matter that we were talking about.
>
> Q. Was this way of proceeding that the union seemed to want to follow acceptable to you?
>
> A. No, it wasn't.
>
> Q. Why not?
>
> A. Because we felt that like if we talked as individuals well, they could only have a few cases, they would satisfy a few. Like Mr. Young, he was the only one that really got something out of the deal, he got a promotion. (Append. at 48-9).

Hollins testified:

> I said that we didn't want to stay for the meeting that we didn't feel like the meeting [of the Adjustment Board] was really representing us because they wanted to take our case as an individual thing and we were fighting it as a whole, not an individual case. (Append. at 114).

[13]Append. at 13.

mony regarding individual employees' complaints, the four walked out of the meeting. A second meeting was held of the Adjustment Board two days later, but none of the four attended.[14]

Shortly thereafter, Hollins went to the Company president requesting that they "talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store."[15] The Company president would not speak to Hollins, but suggested that he talk instead to the Company's personnel director. Hollins refused to talk to the personnel manager, having previously spoken to him about the situation.

Hawkins and Hollins, together with several other employees, called a press conference on October 22 which was attended by representatives of the press, radio and television. The employees stated that the Emporium was engaging in racist conduct by discriminating against racial minorities and that the employees were planning to picket the store. Hollins also read a handbill which the group intended to distribute to the public, and further stated that they "were planning on leafleting and boycotting the store because [they] felt that employees were not being treated fairly, minority employees were not being treated fairly as far as working conditions was [sic]

[14]The record is unclear as to what transpired at this meeting. The record does indicate that two minority employees were promoted by the Company in the fall of 1968 before the November picketing. TXD at 5.

[15]Append. at 121.

concerned."[16] On the following Saturday, November 2, Hollins, Hawkins and two other employees picketed the store from 9:30 a.m. to 6 p.m., distributing the following handbill to people entering and leaving the store:

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON!!!

For years at the Emporium black, brown, yellow, and red people, have worked at the lowest jobs, at the lowest levels. Time and again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at the Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout the Emporium.

We welcome the support of our brothers and sisters from the churches, union, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor Peoples Institute.

While the picketing was in progress, Johnson spoke with Hollis telling him that he did not want to see

[16]Append. at 82.

Hollins fired and suggested that the only way to resolve the matter was through arbitration under the collective bargaining agreement. Hollins responded that they only wanted to talk with the Company president.

On November 7 Hollins and Hawkins were called to the office of the Company's manager of labor relations and given a written warning to refrain from the picketing or possibly be fired.[17] Despite this warning, the two again picketed the store and distributed leaflets the following Saturday. Accordingly, on Monday, November 11, Hollins and Hawkins were fired.[18] The Union subsequently filed a protest with the Retailer's Council challenging the discharges of Hollins and Hawkins, though the Union did not initiate the present action.

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[17]The warning message to Hollins read:

On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.

On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.

The message given to Hawkins was essentially identical.

[18]The discharge slip stated: You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968, in front of the Emporium, 855 Market Street, S. F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68.

On November 19, 1968 the Western Addition Community Organization filed a charge with the N.L.R.B. alleging that the Company had violated section 8(a)(1) of the Act by discharging Hollins and Hawkins. A complaint was issued and a hearing was held on April 8, 1969 before Trial Examiner William E. Spencer. He found that petitioners had engaged in "concerted activity" within the meaning of section 7 of the Act,[19] and that these actions had been based on a good faith belief that the Company was actually discriminating against racial minorities.[20] The Trial Examiner next examined whether these concerted activities lost their protection by virtue of the boycott appeal and the invective used against the Company. Though he criticized the language, and found "the potential for injury [to the Company] considerable,"[21] *he expressed no conclusion on this issue.* Finally, he examined the issue of whether the concerted activities lost their protection because they were "inconsistent with and disruptive of" the procedures for settling grievances under the collective bargaining agreement to such a degree that it "would not effectuate the policies of

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[19]Section 7, 29 U.S.C. § 157 (1970), provides: Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[20]TXD at 10.

[21]*Id.* at 13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel.

JOHN S. IRVING,
Deputy General Counsel.

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ABIGAIL COOLEY,
Assistant General Counsel,
National Labor Relations Board.

NOVEMBER 1973.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

(No. 71-1656, September Term, 1972)

WESTERN ADDITION COMMUNITY ORGANIZATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

THE EMPORIUM CAPWELL COMPANY, *Intervenor.*

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: ROBINSON and MACKINNON, *Circuit Judges,* and WYZANSKI,* *Senior United States District Judge for the District of Massachusetts.*

JUDGMENT

This cause came on to be heard on a petition for review of an order of the National Labor Relations Board and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the decision and order of the National Labor Relations Board ap-

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

pealed from in this cause are hereby reversed and this case is hereby remanded to the Board in accordance with the opinion of this Court filed herein this date.

Per Curiam.

For the Court:

HUGH E. KLINE, *Clerk.*

Date: JUNE 29, 1973.

Opinion for the Court filed by Circuit Judge MACKINNON.

Dissenting opinion filed by Senior District Judge WYZANSKI.

U.S. GOVERNMENT PRINTING OFFICE: 1973